Government of Malaysia v Takasima Industries (M) Sdn Bhd & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO PA-21NCVC-17–10 OF 2017
LIM CHONG FONG J
23 APRIL 2018

Civil Procedure — Summary judgment — Application for — Application by Inland Revenue Board of Malaysia — Recovery of overdue income tax arrears against company — Whether applicant could claim against shareholders of company — Whether notices of assessment delivered — Whether there were delays — Whether application ought to be allowed — Income Tax Act 1967

This was an application made by the plaintiff, the Inland Revenue Board of Malaysia, to enter summary judgment for RM2,069,033.19 against the defendants for overdue income tax arrears under the Income Tax Act 1967 ('the Act'). In support of its application, the plaintiff argued that: (a) s 103(2) of the Act provides where an assessment is made under sub-s 90(3), ss 91, 92 or 96A, or where an assessment is increased under sub-s 101(2), the tax payable under the assessment or increased assessment shall, on the service of the notice of assessment or composite assessment or increased assessment, as the case may be, be due and payable on the person assessed at the place specified in that notice whether or not that person appeals against the assessment or increased assessment; (b) s 107C(9) of the Act provides where any instalment amount due and payable has not been paid by the due date or on the date specified by the Director General, the amount unpaid shall, without any further notice being served, be increased by a sum equal to ten per cent of the amount unpaid, and the amount unpaid and the increase on the amount unpaid shall be recoverable as if it were tax due and payable under this Act; (c) s 75A of the Act provides that both the second and third defendants as the directors of the first defendant were jointly and severally liable for such tax or debt, as the case may be, that is due and payable and shall be recoverable under s 106 of the Act from that person; (d) a certificate under s 142(1) of the Act was signed by the Director General giving the name and address of the defendants and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgement for that amount; and (e) there was no defence in this suit.

Held, allowing the application:

(1) The notices of assessment and notices of additional assessment were issued various dates and sent by ordinary post to the first defendant's last

known address. The first defendant did not dispute the receipt of the notices. Consequently the first defendant is liable to pay the income tax as claimed by the plaintiff notwithstanding if the amount was disputed (see paras 13–15).

(2) The delay on the part of the plaintiff in making the application was not fatal. The plaintiff was excused for having filed the application 37 days after the defendants defence have been served. It was clear that from the record of the Companies Commission of Malaysia that the second and third defendants were the shareholders of the first defendant where each of them held 1,500,000 shares equivalent to 50% share each. Consequently, by virtue of s 75A of the Act, the plaintiff had the right to claim the outstanding income tax due from the second and third defendants too (see paras 20–21 & 23).

[Bahasa Malaysia summary

Ini adalah permohonan yang dibuat oleh plaintif, Lembaga Hasil Dalam Negeri Malaysia, untuk mendapatkan penghakiman ringkas berjumlah RM2,069,033.19 terhadap defendan bagi tunggakan cukai pendapatan terhutang di bawah Akta Cukai Pendapatan 1967 ('Akta'). Dalam menyokong permohonannya, plaintif berpendapat bahawa: (a) s 103(2) Akta memperuntukkan di mana satu taksiran dibuat di bawah sub-s 90 (3), ss 91, 92 atau 96A, atau di mana suatu taksiran dinaikkan di bawah sub-s 101(2), cukai yang perlu dibayar bawah taksiran atau peningkatan taksiran itu hendaklah, atas penyampaian notis taksiran atau penilaian komposit atau peningkatan taksiran, mengikut mana-mana yang berkenaan, dibayar dan perlu dibayar kepada orang yang ditaksir pada tempat yang dinyatakan dalam notis itu sama ada atau tidak orang itu merayu terhadap taksiran itu atau peningkatan taksiran; (b) s 107C(9) Akta memperuntukkan jika apa-apa amaun ansuran yang terhutang dan belum dibayar belum dibayar pada tarikh yang perlu dibayar atau pada tarikh yang ditentukan oleh Ketua Pengarah, amaun yang tidak dibayar hendaklah, tanpa apa-apa notis disampaikan, dinaikkan dengan jumlah bersamaan sepuluh peratus daripada amaun yang belum dibayar, dan amaun yang tidak dibayar dan kenaikan jumlah belum dibayar itu boleh diperolehi seolah-olah ia perlu dibayar cukai dan perlu dibayar di bawah Akta ini; (c) s 75A Akta memperuntukkan bahawa kedua-dua defendan kedua dan ketiga sebagai pengarah defendan pertama secara bersama dan berasingan bertanggungan bagi apa-apa cukai atau hutang, mengikut mana-mana yang berkenaan, yang perlu dibayar dan hendaklah diperoleh di bawah s 106 Akta daripada individu tersebut; (d) suatu perakuan di bawah s 142(1) Akta telah ditandatangani oleh Ketua Pengarah yang memberikan nama dan alamat defendan dan amaun cukai yang perlu dibayar olehnya adalah bukti yang mencukupi tentang amaun yang berkuat kuasa yang sewajarnya dan mencukupi untuk mahkamah memberikan penghakiman bagi amaun tersebut; dan (e) tiada pembelaan dalam guaman ini.

Diputuskan, membenarkan permohonan:

(1) Notis taksiran dan notis taksiran tambahan telah dikeluarkan pada pelbagai tarikh dan dihantar melalui pos biasa kepada alamat defendan pertama yang terakhir diketahui. Defendan pertama tidak mempertikaikan penerimaan notis. Oleh itu, defendan pertama bertanggungan membayar cukai pendapatan seperti yang didakwa oleh plaintif jika pun jumlahnya dipertikaikan (lihat perenggan 13–15).

(2) Kelewatan pihak plaintif dalam membuat permohonan tersebut tidak menjejaskan. Plaintif dimaafkan kerana telah memfailkan permohonan tersebut 37 hari selepas pembelaan defendan diserahkan. Jelas dari rekod Suruhanjaya Syarikat Malaysia bahawa defendan kedua dan ketiga adalah pemegang saham defendan pertama di mana masing-masing mempunyai 1,500,000 saham bersamaan dengan pegangan 50% saham oleh masing-masing. Oleh itu, menurut s 75A Akta, plaintif juga mempunyai hak menuntut cukai pendapatan tertunggak yang terhutang oleh defendan kedua dan ketiga (lihat perenggan 20–21 & 23).]

Notes

For cases on application for summary judgment, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9868–9950.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (refd)

Government of Malaysia v KPM Modal Sdn Bhd [2002] MLJU 158; [2002] 6 CLJ 221, HC (refd)

Government of the Federation of Malaysia v Lee Tain Tshung [1992] 1 MLJ 629; [1991] 2 CLJ Rep 664, HC (refd)

Hasry Sdn Bhd dan satu lagi lwn CIMB Bank (dahulunya dikenali sebagai Bumiputra-Commerce Bank Bhd) [2012] MLJU 1060, HC (refd)

Kerajaan Malaysia v Central Strata Sdn Bhd [2013] 5 MLJ 728; [2013] 8 CLJ 632, HC (refd)

Kerajaan Malaysia v Inai Kiara Sdn Bhd & Anor [2017] MLJU 1349; [2017] 1 LNS 1369, HC (refd)

Kerajaan Malaysia v Neraca Untung Sdn Bhd [2009] MLJU 521; [2009] 1 LNS 575, CA (refd)

Kerajaan Malaysia v Ong Kar Beau [2003] 6 MLJ 225; [2003] 1 LNS 188, HC (refd)

Krishnamurthy & Anor v Malayan Finance Corporation Bhd [1986] 2 MLJ 134, SC (refd)

MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors [1990] 1 MLJ 180, HC (refd)

Microsoft Corporation v Yong Wai Hong [2008] 3 MLJ 309; [2008] 6 CLJ 223, CA (refd)

Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York [1997] 3 MLJ 818, CA (refd)
UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1989] 3 MLJ 177, HC (refd)

Legislation referred to

Income Tax Act 1967 ss 75A, 77A(1), 90(1), (2), (3), 91, 92, 96A, 101(2), 103(2), 106, 107C(9), 142(1), 145(2)
Companies Act 1965
Rules of Court 2012 O 14
Rules of the High Court 1980 O 14

Muhammad Aiman (Inland Revenue Board of Malaysia) for the plaintiff.
Jason Khor (Jit Sheng & Co) for the defendants.

Lim Chong Fong J:

INTRODUCTION

[1] This is an application made by the plaintiff to enter summary judgment for RM2,069,033.19 against the defendants for overdue income tax arrears under the Income Tax Act 1967 ('the Act').

[2] The plaintiff is the Inland Revenue Board of Malaysia.

[3] The first defendant is a private limited company incorporated under the Companies Act 1965 and the second and third defendants are the directors of the first defendant.

[4] The writ and statement of claim of the plaintiff were filed on 4 October 2017 and served on the defendants on 11 October 2017. The defendants filed their defence on 21 November 2017. The plaintiff thereafter sought summary judgment pursuant to O 14 of the Rules of Court 2012 for:

(a) the sum of RM2,069,033.19;

(b) 5% interest per year from the date of judgment until full settlement; and

(c) cost of this suit.

[5] The application for summary judgment was made by the plaintiff on 28 December 2017 ('application') premised upon the following basis and provisions of the Act:

(a) s 103(2) of the Act provides where an assessment is made under ss 90(3), 91, 92 or 96A, or where an assessment is increased under sub-s 101(2),

the tax payable under the assessment or increased assessment shall, on the service of the notice of assessment or composite assessment or increased assessment, as the case may be, be due and payable on the person assessed at the place specified in that notice whether or not that person appeals against the assessment or increased assessment;

(b) s 107C(9) of the Act provides where any instalment amount due and payable has not been paid by the due date or on the date specified by the Director General, the amount unpaid shall, without any further notice being served, be increased by a sum equal to ten per cent of the amount unpaid, and the amount unpaid and the increase on the amount unpaid shall be recoverable as if it were tax due and payable under this Act;

(c) s 75A of the Act provides that both the second and third defendants as the directors of the first defendant are jointly and severally liable for such tax or debt, as the case may be, that is due and payable and shall be recoverable under s 106 of the Act from that person;

(d) a certificate under s 142(1) of the Act was signed by the Director General giving the name and address of the defendants and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgement for that amount; and

(e) there is no defence in this suit.

[6] The affidavits that were filed for purposes of the application are:

(a) the plaintiff's affidavit in support affirmed by Hamisah bt Zakaria on 28 December 2017;

(b) the defendant's affidavit in reply affirmed by Lim Cheng Huat dated 22 January 2018; and

(c) the plaintiff's affidavit in reply affirmed by Hamisah bt Zakaria on 20 February 2018.

[7] After having read the cause papers and written submissions filed by the parties, I allowed the application and entered judgment for the plaintiff as prayed with costs of RM5,000. Consequently, I now provide herein below the grounds of my decision.

CONTENTIONS AND FINDINGS

[8] The law on summary judgment pursuant to O 14 of the Rules of Court 2012 is trite. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627 Mohd Azmi SCJ held as follows:

Under an O 14 application, the duty of a judge does not end as soon as a fact is

asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially under an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14 if the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment, merely because the 'question of law is at first blush of some complexity and therefore takes a little longer to understand' (see *Cow v Casey* [1949] 1 All ER 197; and *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at p 516).

[9] The Inland Revenue Board or Lembaga Hasil Dalam Negeri ('LHDN') for and on behalf of the plaintiff issued the first defendant additional notices of assessment for tax recovery which become due and payable for year of assessments 2003 (Additional), 2004 (Additional), 2006 (Additional), 2007 (Additional), 2008 (Additional), 2008 (Additional), 2009 (Additional), 2010 (Additional), 2010 (Additional), 2011, 2012, 2013, 2014, 2015 including increases of 10%, 10% and 5% pursuant to the Act amounting to the total of RM2,069,033.19.

[10] Notwithstanding that the first defendant had been assessed and paid income tax for the years 2003–2010, the additional income tax assessment for the year of 2003 (Additional), 2004 (Additional), 2006 (Additional), 2007 (Additional), 2008 (Additional), 2008 (Additional), 2009 (Additional) and 2010 (Additional) were imposed based on s 91 of the Act which provides:

91(1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within five* years after its expiration make an assessment or additional assessment, as the case may be in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

[11] For the year of assessment for 2011, the first defendant furnished the income tax return form for companies (Form C) in accordance with s 77A(1) of the Act and the amount of tax payable for that assessment year amounted to RM745,016.25. In this regard, s 90(1) and (2) of the Act provide as follows:

90(1) Where a person has furnished a return in accordance with section 77 or 77A to the Director General for a year of assessment, the Director General shall be deemed to have made, on the day on which the return is furnished, an assessment in respect of that person in the amount of tax on the chargeable income, the tax and the chargeable income being the respective amounts as specified in the return.

(2) For the purposes of this Act, where the Director General is deemed to have made an assessment under subsection (1) —

(a) the return referred to in that subsection shall be deemed to be a notice of assessment; and

(b) the deemed notice of assessment shall be deemed to have been served on the person on the day on which the Director General is deemed to have made the assessment.

The plaintiff had thus been deemed to have made the assessment.

[12] For the years of assessment 2012, 2013, 2014 and 2015, the tax assessment were made in accordance to s 90(3) of the Act because first defendant had not furnished income tax return form (Form C) for those particular years. Section 90(3) of the Act provides as follows:

90(3) Where a person for a year of assessment has not furnished a return in accordance with section 77 or 77A, the Director General may according to the best of his judgment determine the amount of the chargeable income of that person for that year and make an assessment accordingly:

Provided that the making of an assessment in respect of a person under this subsection shall not affect any liability otherwise incurred by that person by reason of his failure to deliver the return.

The defendants had thus been assessed with the estimated assessment.

[13] All the aforesaid notices of assessment and notices of additional assessment were issued on 23 April 2010, 23 April 2010, 23 April 2010, 23 April 2010, 14 February 2013, 30 December 2013, 30 December 2013 and 5 March 2014 respectively and sent by ordinary post to the first defendant's last known address located at 45A 1st Floor, Church Street, 10200 Georgetown, Penang. This address is the address of Wong Thai Sun & Assoc; the tax agent of the first defendant as stated in the summary of financial information by Companies Commission of Malaysia as well as in all the Forms C submitted to the Inland Revenue Board of Malaysia.

[14] By virtue of s 145(2) of the Act, such notices shall be deemed to have been served to the defendants. The provision in the section reads:

145(2) A notice relating to tax which is sent by ordinary or registered post shall be

deemed to have been served on the person (including a partnership) to whom it is addressed on the day succeeding the day on which the notice would have been received in the ordinary course of post if it is addressed:

(a) in the case of a company, partnership or body of persons having a registered office in Malaysia:

(i) to the registered office;

(ii) to its last known address; or

(iii) to any person authorized by it to accept service of process;

(b) in the case of a company, partnership or body of persons not having a registered office in Malaysia:

(i) to any registered office of the company, partnership or body (wherever that office may be situated);

(ii) to the principal place of business or other activity of the company, partnership or body (wherever that place may be situated); or

(iii) to any individual authorized (by or under the law of any place where the company partnership or body is incorporated, registered or established) to accept service of process; and

(c) in the case of an individual, to his last known address.

Gunalan J in the case of *Kerajaan Malaysia v Inai Kiara Sdn Bhd & Anor* [2017] MLJU 1349; [2017] 1 LNS 1369 referred to the Court of Appeal case of *Kerajaan Malaysia v Neraca Untung Sdn Bhd* [2009] MLJU 521; [2009] 1 LNS 575 which held:

> Based on the above evidence, this court is convinced and satisfied that the 1997 (Additional) notice has been properly sent to and served on the respondent at its last known address in accordance with s 145(1) and (2) of the Income Tax Act 1967. The notice must be deemed or presumed to have been served on the respondent. The respondent has failed to rebut the presumption. It is nor disputed that the last known address of the respondent was provided by the respondent's tax agent personally. Hence, the respondent's claim that the 1997 (Additional) notice was not received cannot hold water.

Furthermore in *Kerajaan Malaysia v Central Strata Sdn Bhd* [2013] 5 MLJ 728; [2013] 8 CLJ 632 Lee Swee Seng JC (now J) held as follows:

> I am satisfied that there are good and sound public policy grounds why the presumption should be opted for and applied in this case. If further evidence was required under s 145(2) of the Income Tax Act 1967 in respect of posting of the notices, this would have been expressly set out there in that provision. To me, it was precisely for situations like this that the presumption pursuant to s 114 of the Evidence Act 1950 was provided under general law. The policy behind s 114 is to waive the intricacies of proof required, unless of course reasons are shown to the

contrary, to enable the courts to exercise its discretion, especially where illustration (e) is relevant, to presume that judicial and official acts have been rightly and regularly done for the smooth carrying out and realisation of administrative and judicial functions and objectives.

The first defendant in the present case however did not dispute the receipt of the notices at all material times.

[15] Consequently the first defendant is liable to pay the income tax as claimed by the plaintiff notwithstanding if the amount is disputed which is not even the case here. In *Kerajaan Malaysia v Ong Kar Beau* [2003] 6 MLJ 225; [2003] 1 LNS 188, Zaleha Zahari J (later FCJ) held as follows:

With respect to the pending appeal lodged by the defendant against the assessment raised to the Special Commissioners of Income Tax by which appeal the defendant challenged and disputed the amount of tax sought to be recovered, the plaintiffs case is that the amount claimed is payable notwithstanding the lodgement of that appeal. That the challenge by the defendant that the tax raised was excessive, incorrectly assessed, was no reason for this court not to enter summary judgment against the defendant.

[16] The defendants now in attempted defence vide their submission raised the sole issue of delay on the part of the plaintiff in making this summary judgment application without justification. They contended that this application was only made on 28 December 2017 whilst the defence was filed on 21 November 2017. The defendants further stated that no explanation or justification was stated by the plaintiff in the affidavits in relation to the delay in filing the application for summary judgment.

In this respect, the defendants relied on several cases to support their argument such as *Krishnamurthy & Anor v Malayan Finance Corporation Bhd* [1986] 2 MLJ 134, in the case of *MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180 and *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177. In *Krishnamurthy Nagaratnam & Anor v Malayan Finance Corp Bhd*, Salleh Abas LP held as follows:

In the second place the law as to the time when an application for an O 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided before that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no O 14 judgment could be signed. This is the ratio decidendi in *McLardy v Slateum* (1890) 24 QBD 504. *This case was followed by Raja Azlan Shah, J (as he then was) in Comptroller-General Of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969]

2 MLJ 98 and Abdoolcade J (as he then was) in *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267.

It was hence strenuously submitted that these cases are the authorities that the application for summary judgment under O 14 is unsustainable because of delay in making the same. Furthermore, it was also submitted that failure to explain the delay was considered fatal to the application and therefore summary judgment cannot be entered against the defendants.

[17] The plaintiff in rebuttal referred to the Court of Appeal case of *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818 where NH Chan JCA in his judgment stated that:

> Delay in applying for O 14 is no ground for defeating the plaintiff's right to summary judgment under O 14 when there is no real defence disclosed. 'If the plaintiff is precluded from the application for summary judgment, it would only mean unnecessary prolongment (sic I think the word is 'prolongation') of the case, resulting in a waste of time and added expense for the defendant company' said Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 at p 100.

Furthermore, Gopal Sri Ram JCA held:

> In *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [2000] 1 CLJ 503 this court reversed the High Court and granted leave to defend principally on the ground that the issue whether a valid demand had been made of the defendants in that case was plainly arguable. This court also took into account the fact that the plaintiff in that case had remained inactive for more than a year and then moved for summary judgment without giving notice of intention to proceed under the relevant provision of the Rules. When properly understood, there is nothing in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [2000] 1 CLJ 503 case to suggest that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court. Such a proposition runs counter to the interests of justice. For delay can surely provide no answer to an application made under O 14 where there are no bona fide triable issues. We therefore take this opportunity to declare the absence of the proposition contended for by counsel.

[18] I observed that although in the present case there was no explanation given by the plaintiff for approximately 37 days delay in making the application after the defence was filed, I however found nothing related to the issue of delay was raised by the defendants in their affidavit at the first instance. The defendants only raised the issue of the delay for the first time in their written submission. Thus, the plaintiff was deprived the opportunity to reply in relation to the issue.

[19] That notwithstanding in the case of *Government of the Federation of Malaysia v Lee Tain Tshung* [1992] 1 MLJ 629; [1991] 2 CLJ Rep 664 Syed Ahmad Idid JC (later) ruled that the delay of six months in filing of O 14 application is permissible. In addition, Umi Kalthum J (now JCA) held as follows in *Hasry Sdn Bhd dan satu lagi lwn CIMB Bank (dahulunya dikenali sebagai Bumiputra-Commerce Bank Bhd)* [2012] MLJU 1060;

> Bagi saya, yang dikatakan kononnya kelewatan 1 1/2 bulan itu bagi responden memfailkan lampiran 6 bukanlah suatu kelewatan yang boleh menghalang responden membuat permohonan ini apabila saya ambil kira fakta bahawa perayu-perayu sebenarnya tiada pembelaan yang bermerit berdasarkan pernyataan pembelaannya dan afidavit jawapannya.

Besides that, the Court of Appeal in *Microsoft Corporation v Yong Wai Hong* [2008] 3 MLJ 309; [2008] 6 CLJ 223 decided that:

> In any event, delay in moving for summary judgment is not a ground for refusing relief. In *Perkapalan Shamelin Jaya Sdn Bhd v Alpine Bulk Transport New York* [1997] 3 MLJ 818, this court held that 'delay can surely provide no answer to an application made under O 14 where there are no bona fide triable issues'.

The Rules of the High Court 1980 where all these cases on delay in the making of the O 14 application were based have now been superceded by the Rules of Court 2012. In the Malaysian Court Practice 2015, it is provided as follows:

> This line of decisions shows that the requirement of promptitude brings unnecessary uncertainty and complexity to a summary judgment application and should be discarded. The trend has been moving in this direction as seen in *Interfinance Bhd v Grand Ridge Sdn Bhd & Ors* [1998] 4 CLJ Supp 485 (HC) (where it was held that failure to explain a delay is not fatal per se and that the court will still evaluate the merits of the application); *Lee Wah Bank Ltd v Chee Kong Electrical Engineering Sdn Bhd & 4 Ors* [1999] 6 MLJ 15; [1999] 3 AMR 2939 (HC) (where it was held that unexplained delay is no bar to a summary judgment application); *Hong Leong Finance Bhd v Travers Development Sdn Bhd & Anor* [2001] 5 MLJ 268; [2002] 4 CLJ 706 (HC) (where it was held that right of a plaintiff to enter final judgment summarily cannot be defeated solely on account of a delay); *Abercrombie & Fitch Co & Anor v Fashion Factory Outlet KL Sdn Bhd & Ors* [2008] 4 MLJ 127; [2008] 7 CLJ 413 (HC) (where filing the summary judgment application two months after appearance was entered would not deprive a plaintiff access to this provision); *Eng Say Kuang v Hong Leong Bank Bhd* [2008] MLJU 38; [2008] 10 CLJ 197, HC (where it was held that there is no requirement on the plaintiff's part to explain the delay in filing the Order 14 application and a lack of explanation is not fatal to the application); *Microsoft Corp v Yong Wai Hong* [2008] 3 MLJ 309; [2008] 6 CLJ 223 (CA) (where it was held that a delay in initiating a summary judgment application is not a ground for refusing relief).
>
> It is unfortunate that in the drafting of the present Rules, Malaysia failed to adopt the more sensible Singaporean position where the filing of the statement of defence

is one of the prerequisites before a summary judgment application is filed. This would enable the claimant to evaluate the defences that the defendant raises. Singapore also appears to appreciate that encouraging the filing of an application before the statement of affidavit in reply and often provokes vigorous exchanges of affidavits. Singapore has also amended its provisions to stipulate that an application under this provision should be filed not more than 14 days after the close of pleadings. This is laudable as it sets strict timetables for claimants to file their application and dispenses with the court having to rule whether there has been inordinate delay and an accompanying satisfactory explanation.

[20] Consequently, I find that the delay on the part of the plaintiff in making the application is not fatal. Therefore, I excuse the plaintiff for having filed the application 37 days after the defendants defence have been served.

[21] From the evidence before me, it is clear that from the record of the Companies Commission of Malaysia that the second and the third defendants are the shareholders of the first defendant where each of them hold 1,500,000 shares equivalent to 50% share each.

[22] In this respect, s 75A of the Act clearly provides:

75A(1) Notwithstanding anything contrary to this Act or any other written law —

(a) where any tax is due and payable under this Act by a company, any person who is a director of that company during the period in which that tax is liable to be paid by that company; or

(b) where any debt is due and payable from an employer under any rules made pursuant to section 107 and the employer is a company, any person who is a director of that company during the period in which the debt is liable to be paid by that company, shall be jointly and severally liable for such tax or debt, as the case may be, that is due and payable and shall be recoverable under section 106 from that person.

(2) In this section, 'director' means any person who-

(a) is occupying the position of director (by whatever name called), including any person who is concerned in the management of the company's business; and

(b) is, either on his own or with one or more associates within the meaning of subsection 139(7), the owner of, or able directly or through the medium of other companies or by any other indirect means to control, not less than twenty per cent of the ordinary share capital of the company ('ordinary share capital' here having the same meaning as in the definition of 'director' in section 2).

[23] Consequently by virtue of s 75A of the Act, I am satisfied that the

plaintiff has the right to claim the outstanding income tax due from the second and third defendants respectively too.

CONCLUSION

[24] I echo the following view of Abdul Malik Ishak J (later JCA) in *Government of Malaysia v KPM Modal Sdn Bhd* [2002] MLJU 158; [2002] 6 CLJ 221:

> It must be borne in mind that tax is an important source of income for the Government as it will invariably be used to meet the administrative and development expedition of the country.
>
> In *Director General of Inland Revenue v Teoh Tuan Kwee* [1998] MSTC 3,648 especially at p 3,658, I had occasion to say that:
>
> > The purpose of the Taxing Act — referring to the Income Tax Act, 1967 (Revised 1971) Act 53, are vide that those which have been called revenue enactments and they are intended to ensure the systematic collection of revenue on which the prosperity of this country is dependent upon. Taxpayers must pay taxes for what would be the revenue of the country.

[25] For the foregoing reasons, I am of the view that the plaintiff has a meritorious application. The defendants have not raised any triable issue.

[26] Consequently, I entered judgment for the plaintiff as prayed with costs of RM5,000.

Application allowed.

Reported by Afiq Mohamad Noor